IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1577 of 1982

With

FIRST APPEAL NO. 644 OF 1983

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

and

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? :

2. To be referred to the Reporter or not? :

3. Whether Their Lordships wish to see the fair copy of the judgement? :

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? :

5. Whether it is to be circulated to the Civil Judge? :

F.A. No. 1577 of 1982:

UNA TALUKA SAHKARI KHAND UDYOGMANDALI LTD. : Appellant
(Ori.Deft)

Versus

PANCHSHIL TRANSPORT CORPN & 9 Others. : Respondents
(Ori.Plffs.)

F.A. No. 644 of 1983 :

PANCHSHIL TRANSPORT CORPN,
registered partnership firm, Ahmedabad. : Appellant.
& 9 Others. (Ori.Plffs.)

Versus

Shri Una Taluka Sahakari Khand Udyog
Mandali Ltd., Una. : Respondent
(Ori.Deft.)

Appearance:

F.A. No. 1577 of 1982 :

MR ND NANAVATI for the appellant
NOTICE SERVED for Respondents No. 1, 2, 3, 4, 5, 6,
7, 8, 9,10

F.A. No. 644 of 1983 :

Mr. V.C. Desai for the appellant.
Mr. N.D. Nanavati for respondents.

CORAM : MR.JUSTICE H.R.SHELAT
and
MR.JUSTICE H.H.MEHTA

Date of decision: 04/05/2000

ORAL JUDGEMENT : (Per: H.R. Shelat, J.)

Being aggrieved by the judgment and decree dated 30th November 1981 passed by the then learned 3rd Joint Civil Judge (SD) at Junagadh, in Special Civil Suit No. 4 of 1973 on his file, directing to pay Rs. 65,940.95 ps., both the parties have preferred these two appeals.

2. The facts, giving rise to these two appeals, may be stated. Una Taluka Sahkari Khand Udyog Mandali Ltd., is situated within the local limits of Village Gir Gadhada in Una Taluka of Junagadh District. Hereinafter the same will be referred to as "the Mandali". It is the Co-operative Society registered under Gujarat Co-operative Societies Act. It runs the factory where sugar is produced. Panchshil Transport Corporation is a registered partnership firm (for short the firm) carrying on transport business. Initially the firm was having 10 partners. The Mandali entered into an agreement with the firm for the carriage of sugarcane from different fields to the production unit of the sugar factory. The agreement was reduced into writing. After the agreement was entered into the firm started to carry the sugarcane from different fields to the factory by its 70 trucks. Periodically the production unit of the factory was required to be cleaned, sanitized, rinsed and washed and machineries were to be lubricated. For such maintenance work the production was to be stopped for few hours so that maintenance operation can smoothly be and with expected speed,without any obstruction & break-down, carried out and quota of production can also be maintained. Such stoppage or pause or break is described as the `off period'. Few hours after the off period, if the trucks employed for the carriage of sugarcane were required to be kept under non-use, as per the term of the contract the Mandali agreed to make the loss good at the rate of Rs. 165/= per 24 hours per truck, and if the trucks loaded, with sugarcane were detained without being unloaded the Mandali agreed to make the loss good at the rate of Rs. 190/= per 24 hours per truck. It was also agreed that daily the firm had to carry 1120 tonnes of sugarcane from different fields to the factory, and if the sugarcane in the fields were less than daily tonnage to be carried, the Mandali agreed to pay at the rate of Rs. 5/= per tonne for the short supply so as to make the loss good to the firm. The firm could see that the Mandali later on committed the breach of the agreement. Though after the off period was over, the trucks of the firm were required to be kept under non-use as a result it sustained the loss of Rs. 15,180/= because from 21st

March 1970 to 24th March 1970 the factory remained closed for 84 hours. The off period was of 36 hours, and when the off period was deducted from the total hours (84 hours) for which the factory remained closed, the trucks were required to be kept under non-use for 48 hours, and for such 48 hours at the rate of Rs. 125/= per 24 hours per truck the Mandali was liable to pay Rs. 15,180/=. From 1st December 1969 upto 7th May 1970 there was in all short supply to the tune of 13162.99 tonnes and at the rate of Rs. 5/= per tonne the Mandali caused a loss of Rs. 65,814.95 ps. Because of such breach, the Mandali sustained the loss. Hence it filed the suit being Special Civil Suit No. 4 of 1973 in the Court of the Civil Judge (S.D.) at Junagadh which was assigned to the then learned 3rd Joint Civil Judge (S.D.) at Junagadh for hearing and disposal in accordance with law. In the suit, a decree for Rs. 1,05,394.95 ps., was prayed for.

3. The Mandali after being served with the summons appearing before the lower court filed the written statement (Ex.8) contending inter alia that it had not

committed any breach of the agreement, and so it was not liable to pay any amount. During the pendency of the suit Dahyabhai Nathalal Patel joined as defendant No.9 died. His name was then deleted. It was therefore contended that the whole suit stood abated. In short in the written statement the case alleged in the plaint is denied and consequently the liability to pay. The then learned Civil Judge framed necessary issues at Ex.10. Considering the evidence led by both the parties, the learned Judge held that the firm was not entitled to any amount relating to the off period during which as alleged the trucks remained under non-use, but the learned Judge reached the conclusion that the firm succeeded in establishing its case that there was short supply of sugarcane, as a result it sustained the loss of Rs. 65,914.95 ps. On 30-11-1981 the decree for the said amount came to be passed directing the Mandali to pay the said amount together with proportionate costs. The learned Judge refused to award interest from the date of the suit till payment. The learned Judge also disallowed the claim of Rs. 24,300/= the interest by way of damages.

4. Being aggrieved by such judgment and decree, the firm and its partners, the original-plaintiffs have preferred First Appeal No. 644 of 1983, while the Mandali (original-defendant) has filed First Appeal No. 1577 of 1982 calling in question the legality and validity of the findings given and decree passed.

5. As both the appeals arise out of the same judgment and decree and common questions of law and facts are raised, with a view to avoid waste of time, duplication of work and conflicting judgments, we prefer to hear both the appeals together and dispose the same of by a common judgment. Accordingly, both the appeals are heard together and by this common judgment, the same shall stand disposed of.

6. We will first take up the challenge made in First Appeal No. 1577 of 1982. The Mandli has in this appeal, challenged the claim allowed by the learned Civil Judge submitting that in fact there was no short supply and evidence thereof was wanting. No doubt, the copies of the bills were produced but those bills were not genuine and it was not safe to place any reliance thereon. The learned Judge however without any just cause placed the reliance on those bills and passed the decree, and that error is required to be set right.

7. The contention gains no ground to stand upon. Periodically as and when there was short supply, the firm used to issue the bills and send the same to the Mandali for making the payment. During the course of the hearing, the lower court directed to produce the original-bill' but the Mandali did not produce the same, with the result the firm was permitted to lead secondary evidence. The copies of those bills were then produced by the firm and the learned Judge after perusing the same found that the same were inspiring confidence. He has preferred to place reliance thereon and in our view

rightly so. It may be mentioned that Mansukhrai Joshi, (Ex. 419) serving as Secretary of the Mandali has admitted in his evidence that the bills issued by the firm were received and were passed by the Pay & Accounts Division of the Mandali and were also certified and then the bills were sent to the Account Branch for making the payment, but the payment was later on withheld. The evidence reveals that for no good cause the payment is withheld. It may be stated here that the payment is not withheld on the ground that the bills are false or concocted. When accordingly the Mandali without any just cause though found that the bills were genuine withheld the payment, the learned Judge was perfectly right in placing reliance on those bills. At the time of hearing also, when we made query, the learned advocate

representing the Mandali with his usual candour submitted that there was no reason to make any comment against those bills. In those bills the details viz: during a particular period, what ought to have been the crushing operation in tonnage, what in fact the same was done and to wha==========

mentioned, and then calculating the loss at the rate of Rs. 5/= per tonne the amounts are also mentioned in the bill which, we, tabulise the as under;

Date.	Bill No.	Ex.	Period of short supply.	Ought to have In fact supplied.	supplied.	Short Supply	Amount.
1.	2.	3.	4.	5.	6.	7.	8.
30-12-69	R.C.2	430	16.12.69 to 29.12.69	15680.000	15146.420	0533.580	02667.90
15-01-70	R.C.3	431	31.12.69 to 14.01.70	16800.000	15270.420	1529.580	07647.90
29-01-70	R.C.4	432	15.01.70 to 28.01.70	15680.000	15590.040	0089.960	00449.80
14-02-70	R.C.5	433	29.01.70 to 13.02.70	17920.000	17119.820	0200.180	01000 90

1.	2.	3.	4.	5.	6.	7.	8.

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05-03-70 R.C.6 434 15.02.70 to 04.03.70 23040.000 18990.830 3049.170 15245.85
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22-03-70 R.C.7 435 06.03.70 to 21.03.70 20480.000 18410.530 2069.470 10347.35
i i i i i i i

-------- R.C.8 --- ---------- ---------- --------- -------- --------
i i i i i i i

08-04-71 R.C.9 437 24.03.70 to 07.04.70 18560.000 17389.370 1170.630 5853.15
i i i i i i i

27-04-70 R.C.10 438 09-04-70 to 23-04-70 18560.000 17184.630 1375.370 6876.85
i i i i i i i

08-05-70 R.C.11 439 13 days 16640.000 15093.000 1547.000 7735.00

On the basis of the above referred bills, when the amounts of short supply comes to Rs. 65,814.95 ps., it follows that there is a mistake on the part of learned Judge, and it is qua calculation to the tune of Rs. 100/= more. The mistake will have to be set right. We will now switch over to the case of the firm who has filed First Appeal No. 644 of 1983 for the disallowed claim.

8. According to the plaintiffs, from 21st March 1970 to 24th March 1970, the factory remained closed because of the maintenance operation. During that period for 84 hours the factory remained closed. About the said 84 hours period there is no dispute before us, but certainly the controversy is with regard to the hours of non-use of the trucks. According to the firm, the off period was to be considered for 36 hours, and if that period of 36 hours is deducted from the total period of 84 hours,the trucks remained idle or remained under non-use for 48

hours and for those 48 hours per truck at the rate of Rs. 165/= for 24 hours, the firm was entitled to Rs. 15,180/=, the loss it sustained,but the learned Judge erroneously disallowed the same. The learned Judge, while interpreting the clauses 5 & 11 of the agreement found that there was no fixed period of the hours of the off period and when the trucks remained under non-use for a period of less than 36 hours after the off period, the plaintiffs were not entitled to any amount under that head. It was contended before the lower court that as per Clause 5 of the agreement the off period was of 36 hours,while according to the defendant the off period was for 36 hours and 36 hours more was the off period which could be spelt out perusing Clauses 5 & 11 of the agreement.

9. Of what hours the off period was, is the issue in controversy and therefore relevant clauses of the agreement has to be perused & construed. The agreement is produced at Exhibit 296. Clause 5 thereof reads as under;

(See portion in `Gujarati' version in original Judgment)

while Clause 11 reads as under;

(See portion in `Gujarati' version in original Judgment)

In the above quoted clauses, the hours of off period are not mentioned and therefore there is a controversy regarding reckoning of the period. We have perused the agreement with care and we find that hours of off period are not mentioned, but Clause 11 can be taken to be a guide but that also cannot be said to be the cynosure because it refers to the period of 36 hours after the period of off period. When the agreement is silent on

the point, we have to peruse other materials on record and find out what the parties at the time of agreement meant regarding the off hours. Nathalal Munshibhai (Ex. 312), the Manager of the plaintiff in paras 4 & 5 of his evidence has made it clear that the off period to be treated was of 36 hours maximum but Mansukhrai Jaishankar Joshi (Ex.419) in para 5 of his evidence has stated that the period of off hours depends upon the nature of the maintenance operation to be carried out. It may be from 24 hours to 48 hours depending upon the plant condition but he has made it clear that ordinarily the off period would be of 36 hours. In para 35 also he reiterates that the period of 36 hours which is considered to be the ordinary period of the off hours was the proper period regarding which he stated in examination-in-chief. When the evidence of both these witnesses is read together the emerging cumulative effect indicates that the parties while entering into the agreement were under contemplation that the off period was to be considered of 36 hours. Accordingly, if above stated both the clauses are interpreted, what can be said is that 36 hours was the off period and the following period of 36 hours was as per Clause 11 treated to be the grace period of the original 36 hours period of off hours, and if after the grace hours period, the vehicles remained under non-use, the Mandali agreed to make the loss good to the firm at the rate of Rs. 165/= per 24 hours per truck. In this case, therefore, the period of non-use of the vehicle is to be determined on the basis of the construction as per the above discussion, emerges on record.

10. With regards to such claim from 84 hours' period, 36 hours the off period, and 36 hours the grace period are deducted, it follows that the trucks remained under non-use for only 12 hours, and therefore plaintiffs are entitled to the amounts for the said period of 12 hours. In this regard, the firm submitted a bill No. 8 on 26th March 1970 to the Mandali which is produced at Exhibit 436. In that bill, according to the firm 46 trucks remained under non-use and hence presenting the bill the firm demanded Rs. 15,180/=, but as per the above discussion if the calculation is made, the awardable amounts would come to Rs. 3,795/=. As per that bill, not 70 trucks but 46 trucks remained under non-use and that too for about 12 hours only. If at the rate of Rs. 165/= for 24 hours per truck, the calculation is made for 46 trucks for 12 hours, the amount would come to Rs. 3,795/=. The firm is, therefore, entitled to the said amount and not Rs. 15,180/= it is claiming. The learned Judge has fallen into error in refusing to pass the decree for Rs. 3,795/=. When to the proved claim of Rs.

65,814.95, the claim of Rs. 3,795/- is added, it is clear that the decree of Rs. 69,609.95 ps. ought to have been passed. As that is not done, we, in this appeal, will have to correct the error.

11. We will now switch over to the next issue regarding interest. The firm has come forward with a case that the learned Judge ought to have awarded RS. 24,300/= by way of interest. The learned advocate for the firm also submits that the learned Judge ought to have awarded the interest from the date of the suit till realisation keeping Section 34 in mind.

12. Qua the claim regarding interest as damages, we at this stage think it proper to refer the pronouncement of the Apex Court in Mahabir Prasad Rungta v. Durga Datta - AIR 1961 S.C. 990 wherein regarding the claim of interest, it is laid down as under:-

> ".....Interest for a period prior to the commencement of suit is claimable either under an agreement, or usage of trade or under a statutory provision or under the Interest Act, for a sum certain where notice is given. Interest is also awarded in some cases by Courts of equity."

It is also made clear in the decision by the Supreme Court that as per the well settled law, interest as damages cannot be awarded and interest therefore upto the date of the suit cannot be claimed, but the interest from the date of the suit until the date of realisation would be within the discretion of the court. In view of such decision, the plaintiffs are not entitled to the interest claimed as damages till the date of the suit. It may however be mentioned that there is no agreement between the parties regarding the interest as damages. When such facts and the decision of the Supreme Court are brought to the notice of the learned advocate representing the firm he with his usual candour concedes that the firm is not entitled to the interest as damages and submits that he is not pressing for the same, but certainly makes it clear that he is pressing for the claim of interest from the date of the suit till realisation.

13. Regarding the interest from the date of the suit, the relevant provision in Civil Procedure Code is Section 34. It contemplates two types of cases, one commercial transaction and another non-commercial transaction. In the case of non-commercial transaction when the decree

for payment of money is to be passed, the Court may award interest at such rate which would be reasonable in the context from the date of the suit to the date of the decree, and further from the date of the decree till the payment, or to such other earlier date as the Court thinks it fit, but in that case the rate of interest should not exceed 6% p.a., but the Proviso to Section 34 which relates to commercial transaction provides that all the sums adjudging the rate of interest may exceed 6% p.a. but cannot exceed the contractual rate of interest or where there is no contract regarding the rate of interest,the rate at which monies are lent or advanced by the nationalised bank in relation to commercial transaction. What is therefore made clear is that in respect of the commercial transaction, the minimum rate of interest would be 6% and the maximum rate of interest would be the rate which is agreed upon by the party, or in the absence of any agreement between the parties,the rate at which the nationalised bank advances money. Admittedly, this is the commercial transaction and therefore Proviso to Section 34 would come into play. In the case on hand, rate of interest is not agreed upon by the parties and therefore as per the Proviso to Section 34 court has to award the interest.

14. What would be the reasonable rate of interest is the next question that arises for consideration. At present, the banks are advancing the loans charging the interest at the rate of 12 1/2% to 13% qua the housing loans and with regards to commercial loan it is being charged at the rate of 16%. The rates of interest have remained fluctuating right from the day, the firm by issuing the bills, put forth its claim. When rates are being fluctuating, we have to strike the balance for awarding the just rate and if that is done, in the facts and circumstances of the case, the reasonable rate of interest would be 9% p.a.

15. For the aforesaid reasons, First Appeal No. 1577 of 1982 is liable to be dismissed, while the First Appeal No. 644 of 1983 deserves to be partly allowed. The First Appeal No. 1577 of 1982 is in the result dismissed, while First Appeal No. 644 of 1983 is partly allowed and the decree is modified to the effect that the Mandali shall, instead of Rs. 65,914.95, pay Rs. 69,609.95 to the plaintiff together with interest thereon at the rate of 9% p.a. from the date of the suit till realisation. No order as to costs in these appeals.

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rmr.